U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: OCT 2 3 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded.

The petitioner is a finance, accounting and staffing company. It seeks to employ the beneficiary permanently in the United States as a controller. As required by statute, ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 7, 2012 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

On May 1, 2013, the AAO issued a request for evidence (RFE) requesting evidence of the petitioner's ability to pay the proffered wage. The petitioner responded to the AAO's RFE and submitted the evidence requested. On June 28, 2013, the AAO issued a notice of derogatory information and intent to dismiss (NOID) requesting the beneficiary's Internal Revenue Service (IRS) Form 2012 W-2 or IRS Form 1099-MISC issued by the petitioner and noted inconsistent information in the record that raised doubts as to the beneficiary's qualifications for the offered position. The AAO received the petitioner's response to its NOID on July 29, 2013. Therefore, the record is complete.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the

> priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on October 2, 2011. The proffered wage as stated on the ETA Form 9089 is $80,579 per year. The ETA Form 9089 states that the position requires a bachelor's degree in accounting and 60 months of experience as a controller or as a senior accountant, or in the alternative, a master's degree in finance.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.[2] On the petition, the petitioner claimed to have been established in 2007 and to currently employ 24 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on February 20, 2012, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the record contains a 2011 IRS Form 1099-MISC for the beneficiary listing the petitioner as the payer. The 2011 IRS Form 1099-MISC lists the beneficiary's total compensation as $27,698.30. The record also contains a 2012 IRS Form W-2 and 2012 IRS Form 1099-MISC for the beneficiary listing the petitioner as the employer and payer respectively. The forms indicate that in 2012, the petitioner paid the beneficiary a total of $37,556.73.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent

> either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

The record before the director closed on June 12, 2012 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner's 2012 federal income tax return is the most recent return available. The petitioner's tax returns stated its net income as detailed in the table below.

- In 2011, the petitioner's Form 1065 stated net income of $707,729.[3]
- In 2012, the petitioner's Form 1065 stated net income of $334,702.

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[3] For an LLC taxed as a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 5 (2008-2012) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. *See* Instructions for Form 1065, at http://www.irs.gov/pub/irs-pdf/i1065.pdf (accessed August 12, 2013) (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.). In the instant case, the petitioner's Schedule K for has relevant entries for additional income, deductions, and other adjustments and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its 2011 and 2012 tax returns.

Therefore, for the years 2011 and 2012, the petitioner established that it had sufficient net income to pay the proffered wage or the difference between the wages actually paid to the beneficiary and the proffered wage.

Although the petitioner has established its ability to pay the proffered wage, the appeal cannot be sustained because the petitioner has not established that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the AAO will remand the case to the director for further action.

Beyond the decision of the director,[4] the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

As previously noted in the AAO's NOID, the labor certification requires 60 months of experience as a controller or in the alternate occupation of senior accountant. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a Senior Accountant for [redacted]

The labor certification lists the following employment information for the beneficiary:

Employer	Title	Dates of Employment
[redacted]	Senior Accountant	10/01/2009 – 02/28/2011
	Senior Accountant	01/01/2009 – 10/01/2009
	Senior Accountant	10/01/2006 – 01/01/2009
	Senior Accountant	09/01/2004 – 10/01/2006

Upon further review, the AAO notes that the record contains several inconsistencies regarding the beneficiary's employment.

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[4] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(g)(1). In its response to the director's RFE dated June 12, 2012, the petitioner submitted four employment letters for the beneficiary. The relevant information in the employment letters is summarized below:

Employer	Title	Dates of Employment
[redacted]	Senior Accountant	11/05/2009 – 02/18/2011
	Senior Accountant	10/01/2009 – 10/31/2009
	Accountant	10/24/2006 – 01/15/2009
	Senior Accountant	09/01/2004 – 10/12/2006

Each of these employers lists different employment dates for the beneficiary than those listed on the labor certification. In addition, in a letter dated July 19, 2012, [redacted] General Manager, [redacted] states that the beneficiary's title was "Accountant" and not "Senior Accountant" as listed on the labor certification.

The record also contains a Form G-325A, Biographic Information, signed by the beneficiary on February 16, 2012 and listing the following employment information for the beneficiary:

Employer	Occupation	Dates of Employment
Unemployed		09/2010 – Present Time
[redacted]	Accountant	11/2009 – 09/2010
	Accountant	10/2009 – 11/2009
	Accountant	10/2006 – 01/2009
	Accountant	09/2004 – 10/2006

The employment information listed in the beneficiary's Form G-325 is inconsistent with the other employment information in the record. The beneficiary signed the labor certification on February 20, 2012, a few days after signing the Form G-325A. The labor certification and Form G-325A list different employment dates for [redacted] Further, the Form G-325A lists the beneficiary's occupation as "Accountant" and not as "Senior Accountant," as required by the labor certification. Finally, in the Form G-325A, the beneficiary states that he was unemployed from September 2010 to February 16, 2012, the date that the form was signed. The record contains a 2011 IRS Form 1099-MISC, evidence that the beneficiary worked for the petitioner in 2011, a time when he claims to have been unemployed.

The AAO also notes that the beneficiary's job duties for [redacted] as listed on the labor certification are inconsistent with those listed in a letter on [redacted]

letterhead signed by [redacted] Controller. The labor certification states that the beneficiary's duties include:

- Prepared month end closing transaction and reports
- Prepared and analyze financial statements and management reports
- Prepared daily cash position and cash budget
- Prepared and reconcile daily bank deposits and other bank transactions
- Monitored various daily on-line banking activities
- Bank reconciliation, credit card reconciliation and general ledger reconciliation
- Administered payroll and prepare tax returns such as federal and state withholding
- Supervised accounts receivable department, created collection strategies and monitoring reports
- Recorded vendor and independent contractor invoices

The labor certification lists the following job duties for the beneficiary's employment with [redacted] "Prepared month end closing reports and bank reconciliation. Administered payroll and prepared ta[x] returns for company. Assisted the controller in planning accounting and financial activities of the company. Coordinated audits of company's financial transactions to ensure compliance with government regulations. This position required the use of Internet, computer, and accounting software." Some of the duties listed in the labor certification seem to go beyond the duties described in the company's letter. The letter signed by Mr. [redacted] Controller, did not include assisting the Controller with planning accounting and financial activities for the company or coordinating company audits as part of the beneficiary's duties.

The labor certification, the beneficiary's Form G-325A, the beneficiary's 2011 IRS Form 1099-MISC, and the employment letters in the record of proceeding provide different information regarding the beneficiary's employment from 2004 to 2012. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The evidence in the record does not establish that the beneficiary possessed the 60 months of required experience as a controller or senior accountant by the priority date.

In response to the AAO's NOID, counsel asserts that the beneficiary gave his "best estimates on the employment dates" and "was not able to remember the exact dates of some employment from 4 – 7 years ago." The AAO notes that the beneficiary signed both the labor certification and the Form G-325A in February 2012 and two forms provided inconsistent employment information. Counsel does not explain why the two forms are inconsistent with each other.

In response to the AAO's NOID, the petitioner submits a new, undated letter from stating that is no longer in existence and states that duties listed in his previous letter were not limited to what was included in the letter and that the beneficiary also had the following duties:

- Assisted the Controller in planning accounting and financial activities of the company.
- Coordinated audits of company's financial transactions.

Mr. does not explain why he omitted these duties in his previous letter.

In his brief in response to the AAO's NOID, counsel states that the beneficiary worked for for almost three years and that his duties and responsibilitiess were gradually increased during that time. Counsel states that although the beneficiary's title was listed as "accountant," the duties were those of a "senior accountant." Counsel also states that the beneficiary has "always been employed as a Senior Accountant." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In his brief, counsel also states that the beneficiary listed his title as "Accountant" in the Form G-325A because he was accustomed to describing his position as that of an accountant and counsel asserts that the job duties, not the title, should be used to determine the beneficiary's position.

In his brief, counsel does not address why the beneficiary stated on the Form G-325A that he was unemployed from September 2010 to February 16, 2012, the date that the form was signed. As noted above, the record contains a 2011 IRS Form 1099-MISC for the beneficiary. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has failed to establish that the beneficiary is qualified for the offered position.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence

within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.